the ordinary innocent law-abiding citizen, and this is thought to be such a rule.[20]

Should the converter secure from the judgment also an immunity from self-help, i. e., from a retaking of the chattel by the owner? An English case held that the owner might himself retake his chattel from the converter in spite of a judgment for its value in his favor.[21] This does not conflict with our rules of policy suggested above, but it may be questioned how far, in view of the desirability of avoiding free fights, self-help should be available when court aid is not. It has been held in New Hampshire that a retaking by the owner after judgment but before satisfaction makes the owner liable in trover to the converter after the latter has paid the judgment.[22] This result seems preferable, though it is placed on the fiction—unnecessary under Ames' reasoning—of "title relating back" to the conversion or the judgment when satisfaction is at length made.[23]

Decker v. Milwaukee Cold Storage Co., therefore, states only the ordinary rule applicable to joint or successive converters. To explain the decision in terms of the passage of title does not solve more difficult questions with which the court may be confronted in the future. It may then be desirable to point out that, while joint or successive wrongdoers are not protected by a bare judgment against one of their number, yet such a judgment will be protection both to those who are parties to it and to those who claim under parties to it.

C. E. C.

CRIMINAL RESPONSIBILITY OF PARENT WHO REFUSES TO OBTAIN MEDICAL TREATMENT FOR SICK CHILD

The increasing number of persons whose religious belief discountenances the use of medicine in the treatment of disease gives considerable importance to the interesting legal questions which arise when a parent, because of religious conviction, fails to provide medical attention for his sick child. Two fairly recent cases have expressed opposite views

[20] It might be claimed that only those who *purchase* from the judgment debtor should be entitled to the protection of his judgment. It is thought, however, that the reasons suggested in the text are strong enough to justify protection for any kind of a taker from the converter after a judgment against the latter. Only then can the converter's immunity from further suit—except on the judgment debt—be made practically complete and effective.

[21] *Ex parte Drake* (1877) L. R. 5 Ch. Div. 866.

[22] *Smith v. Smith* (1872) 51 N. H. 571; cf. *Greer v. Lafayette County Bank* (1898, Tex. Civ. App.) 47 S. W. 737; *Acheson v. Miller* (1853) 2 Oh. St. 203.

[23] The same rule applies to increase of the chattel prior to satisfaction. *Hepburn v. Sewell* (1821, Md.) 5 H. & J. 211; *White v. Martin* (1834, Ala.) 1 Port. 215. The doctrine of relation is criticised by Holmes in *Miller v. Hyde, supra* note 3, and by Ames, *op. cit.* note 1. In *Bacon v. Kummel* (1866) 14 Mich. 201, it was held not to apply so as to make an otherwise rightful act a trespass. Cf. *Third Nat'l Bank v. Rice* (1908, C. C. A. 8th) 161 Fed. 822, 15 Ann. Cas. 450, note.

of the parent's criminal responsibility in case such lack of treatment results in the child's death.

In *Bradley v. State* (1920, Fla.) 84 So. 677, it appeared that the defendant's daughter, under sixteen years of age, in an epileptic paroxysm fell unconscious into a fire and was severely burned. The defendant believed in divine healing by prayer and refused to summon or to permit others to summon a physician to attend the child, although according to the testimony of a witness who saw her two weeks after the accident she was suffering intensely. After remaining more than four weeks at the defendant's home without other treatment than prayer, the child was sent to the State Hospital for the Insane, where she received treatment from physicians. Three weeks later she died. The physicians testified that her death resulted from the burn and that in their opinion she would have recovered if she had received medical attention promptly after the accident. The father was convicted of manslaughter under a statute which defined this crime as "the killing "of a human being by the act, procurement or culpable negligence of "another." This conviction was reversed by a divided court, the majority opinion stating that "the general definition of manslaughter con- "tained in the statute does not appear to cover a case of this nature."[1]

On the other hand, in *State v. Barnes* (1919) 141 Tenn. 469, 212 S. W. 100, where the defendant was indicted for wilfully and without good cause failing to provide for his minor child by suffering the child to sicken and die without proper care and medical attention, the court said:

"It is the legal duty of the father to provide 'proper care, treatment 'and medical attention' for his child. . . . If by reason of his breach of this duty the death of this child resulted, we think the father may be guilty of homicide."

Before proceeding to discuss the main problem, namely, whether failure to procure medical treatment in case of serious illness can be deemed "culpable negligence" on the part of the parent, it may be well to dispose of the preliminary question of the causal connection between such failure and the subsequent death of the child. It is elementary that if a person is to be held criminally responsible for the death of another, his act or failure to act must have caused, or at least have

[1] The court apparently relied also upon supposed lack of causal connection between the father's conduct and the death of the child. Whitfield, J. at p. 679: "Manifestly the death of the child was caused by the accidental burning in which the father had no part. The attentions of a physician may [might] or may [might] not have prevented the burning from causing the death of the child; but the absence of medical attention did not cause 'the killing' of the child, even if the failure or refusal of the father to provide medical attention was 'culpable negligence' within the intent of the statute."

Here the court invaded the province of the jury, it would seem. If the parent's conduct was culpable negligence, then the question whether such negligence caused the death is one of fact for the jury. See *infra,* notes 3 and 5.

accelerated, the death of such other.[2] Is medical science sufficiently exact so that it is possible to prove beyond a reasonable doubt that medical treatment would have saved or prolonged the life of the deceased, or, in other words, that failure to provide it caused or accelerated the death? Browne, C. J., in the Florida case believes that this question must be answered in the negative.[3] While it is not sufficient for physicians to testify merely that the sick person's life *might probably* have been prolonged by medical treatment,[4] positive expert opinion that his life *would* have been prolonged is accepted by the overwhelming weight of authority as competent evidence to sustain a jury's verdict that lack of such treatment did in fact cause or accelerate the death.[5] Expert medical testimony that a blow or a poison caused death in a given case is accepted without question; yet such testimony is only a conclusion of the witness based upon experience of what usually happens under similar circumstances. A competent physician's opinion that a given disease or a burn would have been cured by certain medical treatment, because experience in a large number of similar cases has shown that such cures have been effected, is no less credible and convincing to a great majority of the community, even though there be a considerable number who disbelieve in the efficacy of medicine.

Assuming, then, that competent evidence convinces the jury that medical treatment would have saved or prolonged the child's life, the problem remains whether a parent who fails to supply it because of an honest disbelief in its efficacy, should be held guilty of manslaughter. That "criminal negligence" may take the place of evil intent and supply the *mens rea* commonly said to be necessary to establish guilt of manslaughter needs no argument.[6] The precise question, therefore, is

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[2] *Reg. v. Morby* (1882) 15 Cox C. C. 35; *Rex v. Instan* [1893] 1 Q. B. 450; *State v. Lowe* (1896) 66 Minn. 296, 68 N. W. 1094; *Commonwealth v. Hoffman* (1903) 29 Pa. Co. Ct. 65, 70.

[3] Browne, C. J., in his concurring opinion says: "The fallacy of this [the state's case] is that it was not proven, and was not capable of being proven, that if the child had had medical attention it would have recovered. And that must always be the fallacy in an attempt to attach the guilt of manslaughter to a father for failing to call a physician whenever his child is sick, if it subsequently dies." See also note 1, *supra*.

It is believed that *Bradley v. State* stands absolutely alone in the assertion that causal connection between the death and the lack of treatment is incapable of legal proof. Compare, note 5, *infra*.

[4] *Reg. v. Morby, supra* note 2.

[5] In *Reg. v. Senior* [1899] 1 Q. B. 283, the judge instructed the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical attention. One of the questions reserved was whether there was evidence upon which the jury could properly convict the prisoner. The conviction was affirmed. See also *Commonwealth v. Hoffman, supra* note 2, and the cases cited in annotations in 6 L. R. A. (N. S.) 685; 45 *id.* 559; 10 A. L. R. 1137.

[6] 1 Bishop, *New Criminal Law* (8th ed. 1892) secs. 313, 314.

whether criminal negligence can exist where the parent acts from the best of motives and, as he honestly believes, in the interest of the child. The answer must depend upon whether the standard of conduct, departure from which may constitute criminal negligence, shall be the defendant's personal standard of reasonable conduct or an objective standard based on what the average prudent citizen would deem reasonable conduct under the circumstances. The objective standard has been universally accepted as the basis of responsibility for negligent torts,[7] but there are conflicting views as to which standard obtains in criminal law.[8] Moral guilt perhaps implies a certain state of consciousness with reference to the consequences of one's acts. But it is not necessarily true that only morally blameworthy acts should be punished criminally. The chief purpose of the criminal law is to induce conformity to certain rules of conduct believed to be for the general good. Consequently the standard of lawful conduct should be an external standard established in the interest of the community. The standard is such that failure to conform is blameworthy in the average member of the community. For the welfare of all, the particular individual may be required to reach that average standard at his peril and may justly be punished for failure to do so, however pure his motives or intentions.[9]

That an objective standard may be imposed by legislation will scarcely be questioned. In numerous jurisdictions the standard of conduct required of a parent in respect to his minor child has been declared by statute; and statutes imposing a duty "to support,"[10] or to supply "necessaries,"[11] or forbidding "wilful neglect" injurious to the child's health[12] have been construed to require the furnishing of necessary medical care and treatment; while in New York the code expressly

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[7] See Tindal, C. J., in *Vaughan v. Menlove* (1837, C. P.) 3 Bing. N. C. 468, 475: "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

[8] *Commonwealth v. Pierce* (1884) 138 Mass. 165, 176 maintains the objective standard; *State v. Schulz* (1881) 55 Iowa 628, 8 N. W. 469, maintains the individual standard. See also (1899) 12 HARV. L. REV. 428; (1902) 15 *id.* 500; (1920) 6 CORN. L. QUAR. 105.

[9] The most effective exposition of this view has been made by Mr. Justice Holmes in *The Common Law,* chap. II.

[10] *Owens v. State* (1911) 6 Okla. Cr. 110, 116 Pac. 345, Ann. Cas. 1913 B, 1218, note.

[11] *Rex. v. Brooks* (1902) 9 B. C. 13; *Rex v. Lewis* (1903) 6 Ont. L. R. 132; *Commonwealth v. Hoffman, supra* note 2; *Commonwealth v. Breth* (1915) 44 Pa. Co. Ct. 56; and see 10 A. L. R. 1145, note.

Compare *Justice v. State* (1902) 116 Ga. 605, 42 S. E. 1013, holding that "necessary sustenance" does not embrace medical attention.

[12] *Reg. v. Senior, supra* note 5.

declares the parent's duty to supply "medical attendance."[13] Of course such legislative enactments do not contemplate the summoning of a physician for every trifling illness. A reasonable discretion remains vested in the parent, and the standard determining when it is necessary to call in the services of a physician is that of the ordinarily prudent person solicitous for the welfare and recovery of his child.[14] Where such statutes exist and make breach of the duty a misdemeanor, the courts have had no difficulty on familiar principles in holding the parent whose failure to provide medical treatment has caused or hastened the child's death guilty of manslaughter.[15] That the parent has acted from religious conviction that prayer was more efficient than medicine is immaterial, except as a circumstance to mitigate the severity of the sentence to be imposed. Laws cannot interfere with religious beliefs and opinions, but they may with practices. A contrary view "would make the professed doctrines of religious beliefs superior to "the law of the land and in effect permit every citizen to become a law "unto himself."[16] The welfare of the community requires that everyone should submit to quarantine rules and to other health and police regulations, whatever his personal views as to their efficacy or their sanction in religion.

The same reasons which justify imposing by legislation an objective standard of conduct argue persuasively for an objective standard in drawing the line at common law between careful and negligent conduct. On the principle that manslaughter may be committed by the negligent omission to perform a legal duty when such omission endangers life and in fact results in death,[17] a parent able to supply food[18] or shelter[19]

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[13] *People v. Pierson* (1903) 176 N. Y. 201, 68 N. E. 243. Here the prosecution was for violation of the statute, not for manslaughter, though it would seem that the latter charge might have been maintained.

[14] This is well stated by Haight, J. in *People v. Pierson, supra* note 13, at p. 205. See also *Rex v. Lewis, supra* note 11, at p. 144.

[15] See citations in notes 5, 10, 11 and 12, *supra*.

Section 3238 Fla. Gen. St. 1906, provides that "any person . . . who shall wilfully deprive such child or ward of necessary medical attention, shall be deemed guilty of a misdemeanor. . . ." Why a breach of this statutory duty, resulting in the child's death, should not have been held to constitute manslaughter in *State v. Bradley, supra,* is not apparent. See *State v. Staples* (1914) 126 Minn. 396, 148 N. W. 283.

[16] Waite, C. J., in *Reynolds v. United States* (1878) 98 U. S. 145, 166 (prosecution for polygamy); see also *State v. White* (1886) 64 N. H. 48, 5 Atl. 828 (nonobservance of Sunday law); *Commonwealth v. Breth* (1915) *supra* note 11, at p. 59.

[17] Wharton, *Homicide* (3d ed. 1907) 685 *et seq.*

[18] *Reg. v. Bubb* (1851) 4 Cox C. C. 455; *Reg. v. Conde* (1867) 10 Cox C. C. 547; *Rex v. Instan, supra* note 2; *Lewis v. State* (1883) 72 Ga. 164; *State v. Staples, supra* note 15.

[19] See *Territory v. Manton* (1888) 8 Mont. 95, 19 Pac. 387; *Reg. v. Brown* (1893) 1 Terr. L. R. 475, 1 N. W. Terr. Sup. Ct. pt. 4, p. 35.

to his helpless child and neglecting to do so is clearly guilty of this crime if the child's death results. The common-law duty of a parent is generally held to embrace the furnishing of necessary medical care[20] as well as food and shelter. But it may be urged that the two classes of cases are distinguishable because no sane parent can honestly believe food and shelter unnecessary to the preservation of life, while many exemplary citizens do honestly disbelieve in the efficacy of medicine.[21] This difference is immaterial, however, if the objective standard of careful conduct be adopted. If the defendant knows that the child's condition is such that the average prudent and solicitous parent would foresee danger to its life and summon medical aid, but he refuses to do so because of his personal disbelief in medicine, his failure to conform to the objective standard of due care in the performance of his duty as parent should be deemed culpable negligence. It is believed that the weight of the small amount of legal authority which exists favors this conclusion.[22]

The health of the child is of vital interest to the State, no less than to the parent. So long as a majority of the citizens believe in the efficacy of medicine there is no injustice in requiring all parents to conform to the majority standard of careful conduct and in punishing wilful failure to do so which results in the child's death. At present the majority view is that prayer may be added to medical treatment, but not substituted for it in serious illness. When, if ever, those who believe prayer more efficacious than medicine, shall become the majority, then the required standard will change and parental responsibility will be judged on a new basis. That the majority standard will not be abused as an instrument of persecution of the minority is evidenced by the very small number of cases reporting criminal prosecutions in such circumstances.

T. W. S.

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[20] See authorities cited in the strong dissenting opinion of West, J. in *Bradley v. State, supra,* at p. 681, and in *State v. Barnes, supra.*

[21] See *Reg. v. Wagstaffe* (1868) 10 Cox C. C. 530, 533.

[22] The English cases prior to the enactment of the statute are discussed in *Reg. v. Senior, supra* note 12, Lord Russell saying, at p. 292, "I am not satisfied that in the present case there was not sufficient evidence, at common law, to justify a conviction."

In *Rex v. Brooks, supra* note 11, the count charging breach of the common-law duty was held sufficient, as well as the count based on the statutory duty to provide necessaries.

The American authorities by decision or dictum favor responsibility at common law. *State v. Barnes, supra; Stehr v. State* (1913) 92 Neb. 755, 139 N. W. 676, 45 L. R. A. (N. S.) 559, note; *State v. Staples, supra,* note 15; *Spead v. Tomlinson* (1904) 73 N. H. 46. 59 Atl. 376. *Contra, State v. Sandford* (1905) 99 Me. 441, 59 Atl. 597. It would seem that cases under statutes which are merely declaratory of the parents' common-law duty to supply "necessaries" are also persuasive on the point under discussion. See citations in notes 10 and 11 *supra.*